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No. 604.

In the Supreme Court of the United States.

October Term, 1910.

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JAMES H. McKENNEY,
Clerk.

THE MERRIMACK RIVER SAVINGS BANK,
Appellant,

vs.

THE CITY OF CLAY CENTER, KANSAS, a Municipal Corporation; GEORGE W. HANNA, Mayor of said City; O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWEISER, E. D. HARTWELL, and S. D. TRIPP, Composing the City Council of said City; and the CLAY CENTER LIGHT & POWER COMPANY, a Corporation,
Appellees.

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BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

This cause comes before the Court on the motion filed by the City of Clay Center, and its officers, to advance and submit the appeal for hearing. The date set for this hearing is October 17, 1910. Counsel for the appellant have been duly served with a

printed brief and argument in behalf of the appellees, which contains, substantially, all of the record necessary for this Court to consider in determining the question of jurisdiction, which is the only controversy involved in the suit.

As stated by appellees, this suit was commenced in the Circuit Court for the District of Kansas by the appellant as the holder of a first lien on property owned by the Clay Center Electric Light & Power Company, a Kansas corporation. To the original bill, the City of Clay Center, and its officers, demurred on the ground that the allegations of the bill were insufficient to give the court jurisdiction. Before the court passed upon this demurrer, appellant asked, and obtained, leave to file an amended bill, which was accordingly done. Afterwards the same appellees demurred to the second amended bill, and the demurrer was sustained. The Circuit Court delivered an opinion, holding that the amended bill did not state facts sufficient to confer jurisdiction upon a Circuit Court of the United States; but, at the close of the opinion, as well as in the interlocutory order, the Circuit Court permitted appellant to again amend its bill. Accordingly, a second amended bill was filed, to which the same appellees again demurred, and the demurrer was sustained, the court holding that the deficiencies of the original and amended bills had not been supplied.

In view of this state of the record, counsel for appellant deem it unnecessary to follow the argument of our respected adversaries so far as it seeks to attack the sufficiency of either the original or the first amended bills of complaint. Accordingly, our

argument of the jurisdictional questions involved will be confined to the matter contained in the second amended bill which will be found on pages 45 to 67 of appellees' Brief. We cannot assume that this Court will decide this case upon any other pleading than that upon which the final decree of the Circuit Court is based.

Contentions of the Parties.

The contentions of the parties may be stated very briefly: On the part of the appellees it is contended that, by reason of the fact that this is a suit to enjoin the City of Clay Center and its officers from interfering with the property of appellant's mortgagor, and because such mortgagor is a Kansas corporation whose citizenship is the same as that of the City of Clay Center and the individual defendants, therefore, the Kansas corporation must be arranged on the same side of the controversy with the appellant—a corporation of New Hampshire—with the resulting effect that no jurisdiction appears from the face of the bill by reason of diverse citizenship of the parties.

Appellees further contend that, admitting (as they do by the demurrer) all of the facts well pleaded in the second amended bill of complaint, no case arising under the Constitution or laws of the United States is presented; and, therefore, the jurisdiction of the Circuit Court cannot be sustained on that ground.

On the part of the appellant, it is contended that, even if it be conceded that the Clay Center

Electric Light & Power Company is a necessary party to the litigation, and that by reason of the identity of its interest in the controversy with that of the appellant, it should be arranged on the plaintiff's side of the controversy with the resulting effect of ousting the jurisdiction of the Circuit Court, for want of the necessary diversity of citizenship; none the less, the facts alleged in the second amended bill of complaint, and admitted by the demurrer, present a case arising under the Constitution and laws of the United States within the meaning of the decisions of this Court on that subject.

ARGUMENT.

With the greatest respect for our learned adversaries we have found it impracticable to follow the points made in their Brief in the order in which they are presented; we think, however, that one of the decisions of this Court referred to and discussed by them fully discloses the theory upon which they ask an affirmance of the judgment of the trial court. The case referred to is *City of Dawson* v. *Columbia Trust Company*, 197 U. S. 178.

In the course of argument, it is remarked, on page 139 of their Brief, that the decision of this Court in the case of the City of Dawson seems to have been made in order to fit this case; and, we concede, that if the case at bar is not distinguishable from that case, then the judgment of the trial court should be affirmed. From the report of the case it appears that a mortgagee of the Dawson Water Works Company brought its bill in equity in the Circuit Court for the District of Georgia, to restrain the City of Dawson from taking measures to build a new set of water works and to compel it to specifically perform a contract made with the Water Works Company to pay a certain sum of money for the use of water for a period of twenty years. The only ground of jurisdiction upon which the original bill was predicated was diverse citizenship of the parties. The allegations of this bill disclose a formal repudiation of the contract and a refusal to pay for

the water, alleging continuous use of such water by the city. It further alleges the calling of an election by the city to determine whether bonds should be issued to buy a water works plant, a vote in favor of such issue, an issue of bonds, and an intention to sell the bonds for the purpose of erecting water works. There was the usual allegation that irreparable injury would flow from the city's action. The Water Works Company was made a party defendant and served with process. Afterwards the bill was amended so as to allege that the acts of the city complained of in the original bill, impaired the obligation of complainant's mortgage and deprived it of its property without due process of law. The complainant had a decree and the city appealed.

Mr. Justice Holmes, delivering the opinion of the court, first pointed out that it was obvious that the Water Works Company was on the plaintiff's side of the controversy, and since it was a citizen of Georgia and the other defendants were likewise citizens of the same state, the jurisdiction of the Circuit Court could not be sustained on the ground of diverse citizenship. He also pointed out that in the answer filed by the city and its officers, it was alleged that a suit brought in the State Court by the Water Works Company against the city to recover compensation for the water which had been used by the city, resulted in a decision by the Supreme Court of Georgia, holding that the contract under which the Water Works Company claimed, was void; and he added that the Water Works Company had been made a defendant "solely for the purpose of re-opening in the United States Court a controversy which

had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill." Accordingly this Court held that it was apparent that the Circuit Court had no jurisdiction on the ground of diverse citizenship. Taking up the allegations of the amended bill, setting up constitutional rights, the learned Justice added:

> "The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the Supreme Court of the state, there was a wrong, was complete then. The repudiation and refusal was kept up until the bill was filed and the other action was subsequent, subordinate to and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts, or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Company* v. *St. Paul,* 181 U. S. 142-150."
>
> "Undoubtedly the decisions on the two sides of the line are very clear to each other. But the case at bar is governed by the one which we have cited and not by *Walla Walla* v. *Walla Walla Water Works,* 172 U. S. 1, which is cited and distinguished in *St. Paul Gas Light Company* v. *St. Paul.*"

The learned Justice then points out that in *Vicksburg Water Works Company* v. *Vicksburg,* 185 U. S. 65, the city had made a contract with a water works company and afterwards a law was passed author-

izing the city to build new works; and that the city, acting under the law, denied liability and took steps to build the works, whereupon the Water Works Company filed its bill alleging the unconstitutionality of the law. This bill was held by this Court to present a case arising under the Constitution. He then continues:

> "In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state. * * * We repeat that something more than a *mere refusal* of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States."

The case of *St. Paul Gas Light Company* v. *St. Paul*, referred to in the opinion *supra*, well illustrates, we think, the meaning to be given to the language employed by Mr. Justice Holmes. Furthermore, that case is interesting because it was brought to this Court by writ of error to the Supreme Court of Minnesota. The suit as originally brought was to recover the interest on the cost of construction of lamps built by the Gas Company under an ordinance granting it a franchise relative to which the city subsequently denied any obligation. In the statement of the case it is said that the complaint alleged that the city was obliged to pay the interest on the cost of the lamps, although they were no longer in use for

lighting purposes. The ordinance repudiating the obligation to pay was expressly set out in the bill coupled with an allegation that in legal purview such ordinance amounted to an action by the city, impairing the obligation of the contract. The first head note to the case fairly discloses, we think, the rule to be applied to such cases. It reads as follows:

> "A by-law or ordinance of a municipal corporation may be such an exercise of legislative power, delegated by the Legislature as a political sub-division of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the Constitution of the United States."

It is quite apparent that this Court distinguishes the cases of which the two we have referred to are types, from the cases of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, and *Vicksburg Water Company* v. *Vicksburg*, 185 U. S. 65.

With these preliminary observations respecting the decision relied upon by our adversaries, we take leave here to re-print the allegations of the second amended bill upon which the appellant relies to sustain the jurisdiction of the Circuit Court; but, in the interest of brevity, we state the substance of the allegations which refer to the rights of the appellant to maintain an action, whether in the state or Federal court, against the city. From the statement in the second amended bill, it appears that in April, 1886, the defendant city adopted an ordinance conferring upon one Dexter the right to use the streets and alleys of the city for the purpose of erecting and

maintaining poles, wires and other equipment necessary to furnish electric light and power, not only to the city, but to its inhabitants. Afterwards Dexter assigned his rights under this ordinance to Williamson, who died testate, and whose estate has been completely settled. During his ownership of the property, Williamson executed a trust deed or mortgage upon the property, which, by assignment, became the property of appellant. This mortgage is for the sum of fifteen thousand dollars, and is not yet due. The bill alleges that there were certain conditions annexed to the enjoyment of the franchise by Dexter, which were fully performed by him, and states, that at the time of the filing of the suit, the appellant was the owner of a first mortgage lien upon the tangible property used for the production of electric light and power, and also upon the franchise connected therewith; that in 1906 the Clay Center Light & Power Company, a Kansas corporation, incorporated in 1906, acquired the tangible property and franchises together with all business connections of every kind and nature, appurtenant to the Electric Light Plant which had been erected and conducted by Dexter and Williamson, and ever since that time has carried on the business under the grant of the ordinance, except, that at the expiration of twenty-one years after the ordinance was adopted (which twenty-one years was completed in 1907) the city itself has not been a customer of the Electric Light Company, and so much of the grant and contract as refers to the furnishing of electric light and power to the city, is of no further avail. Then follow allegations to the effect that the Light and Power Company has recognized appellant's

lien, and that no controversy exists between that company and the appellant. The remainder of the bill is devoted to the presentation of what the appellant conceives to be its rights under the Constitution of the United States, and particularly the contract clause and the Fourteenth Amendment. These allegations are as follows:

That at the time said ordinance was adopted and said contract executed the only restriction imposed by the laws of the state of Kansas upon cities of the second class (of which class defendant city was and is one) was that such cities should have no power to enter into contracts for lighting their streets and alleys to continue for a longer period than twenty-one years, but, no limitation whatever was imposed by the laws of Kansas at said time relative to the duration of contracts by which said cities granted to persons or corporations the privilege of using their public streets and alleys in carrying on the business of transmitting electricity for light and power by means of poles and wires erected and maintained upon and along such public highways and grounds, provided such instrumentalities were constructed and maintained with due regard to public welfare, safety and convenience;

That, in 1905, the state of Kansas passed a law known as Chapter 121, Laws of 1905, which among other things provides as follows:

> "SECTION 1. The streets, alleys, public parks and grounds in cities of the second and third classes in the state of Kansas shall be under the control of the mayor and councilmen of the

municipalities thereof and the jurisdiction over and control thereof is vested in said cities.

SEC. 2. Before any person, firm or corporation shall have the right to enter the streets, alleys, public parks and grounds of any city of the second and third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephones or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting unto such person, firm or corporation such right or rights and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded.

SEC. 3. Any person, firm or corporation, their agents, servants or employes, who shall, without first having obtained by ordinance from such municipal authorities as hereinbefore provided, authority so to do, enter upon any of the streets, alleys, public parks or grounds of such cities and interfere with the surface thereof, or dig ditches, or obstruct the same in any way, or otherwise interfere therewith, shall be guilty of a misdemeanor for each day this act shall be thus violated, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars for each offense."

That by the said Act of 1905 the State of Kansas placed the entire control of the use of the streets of said city in the hands of its officers, to-wit, its mayor and council, and authorized said city to withhold its consent to the use of its streets and alleys upon any pretext and for any or no reason.

That in pursuance of such power and authority so granted, the said city by its mayor and council in October, 1906, duly passed a resolution declaring

that said city would not consent to the said Light & Power Company's use of said streets and alleys beyond the expiration of twenty-one years from April 22, 1886, and duly notified said company of said resolution; and, in March, 1907, the said city duly adopted an ordinance in terms repealing said ordinance and contract of April 22, 1886.

That in April, 1907, after the expiration of twenty-one years from the date of said ordinance of April 22, 1886, said Light & Power Company duly commenced an action against said city to compel it to perform the obligations of said ordinance of April 22, 1886; and, in litigation, such proceedings were had in the Kansas Supreme Court that said ordinance of April 22, 1886, was adjudged to be a grant to said Dexter and his assigns of the right, privilege and franchise to use the streets and alleys of said city for a period exceeding twenty-one years; and that such a grant was wholly beyond the corporate powers of said city, *ultra vires* and void. Your orator avers that it was not a party to said litigation.

VII.

Your orator avers that under said ordinance of April 22, 1886, and by virtue of the conveyance aforesaid, the said Light & Power Company has a lawful right to occupy said streets and alleys in the manner aforesaid; but said city of Clay Center and the individual defendants herein, as officers of said city, acting under and by virtue of the powers conferred upon them by said statute of 1905, relative to the control by said city of the use of its streets

and public grounds and acting under the decision of said Supreme Court relative to said ordinance of 1886, threaten to and will, unless restrained by the order of this Court, tear down, remove and utterly destroy the poles, wires and other equipment now and for some time before the beginning of this suit employed by said Light & Power Company, defendants herein, for the distribution of electric light and power to the citizens of Clay Center; that said city and said individual defendants, as officers thereof, are authorized and have the right so to tear down, remove and destroy the property of said Light & Power Company so employed and to institute criminal proceedings against said company and its officers and employes for continuing to use said streets and alleys for said purpose by virtue of the authority conferred upon cities of the second class by said Act of 1905, and by said decision of the Supreme Court; that said city of Clay Center and said individual defendants have demanded of the said Light & Power Company that it forthwith remove said posts and wires from the streets and public grounds of said city, and thereby compel the said Light & Power Company to discontinue its said business of distributing electric light and power by means of said posts and wires to the citizens and inhabitants of said city; that said poles and wires are a part and parcel of, and connected with, said electric power plant owned and used by said Light & Power Company, and constitute the only available means by which said Light & Power Company can distribute to the citizens of said city electric light and power to carry on the business for which it was incorporated and for which its property is adapted; that if said poles and wires are

torn down, removed and destroyed by said city and said individual defendants, acting as officers thereof, the business and property of said Light & Power Company will be utterly destroyed and become wholly useless and thereby the security of your orator for the payment of its debt will be greatly impaired, if not made wholly worthless; that said city of Clay Center and said individual defendants, unless restrained by this Court, threaten to, and will, by force and violence, remove said poles and wires from said streets and alleys, and resort to criminal process against said Light & Power Company and its servants and otherwise interfere with and damage the business of said company with the resulting effect of impairing and destroying the aforesaid security of your orator.

Your orator avers that the statute enacted by the Legislature of the State of Kansas in 1905, and hereinbefore referred to, impairs the obligation of the contract entered into by said city of Clay Center and said Dexter in 1886 under which your orator is bound to and does claim security for the payment of its debt, and, therefore, your orator avers that said act of the Legislature of the State of Kansas, enacted in 1905, and hereinbefore referred to, violates that provision of the Constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts; and your orator further avers that the decision of the Supreme Court of Kansas, holding and deciding that said city of Clay Center had no power or authority to grant unto the said Dexter and his assigns the use of said streets and alleys for the erection thereon of poles to carry

wires to distribute electric light and power to the citizens and inhabitants of said city for a longer period than twenty-one years, impairs the obligations assumed by said city under said contract and denies unto your orator the equal protection of the laws in violation of the Constitution of the United States, and said threatened acts of said city of Clay Center and of the individual defendants, as officers of said city authorized by said statute and decision, to-wit: the tearing down, removing and destroying said poles and wires and thereby making worthless the property upon which your orator depends for the payment of its debt, will deprive your orator of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States providing that no person shall be deprived of his property without due process of law. The bill closes with a prayer for an injunction. An injunction *pendente lite* was granted, and, as will be observed from the final decree dismissing the second amended bill for want of jurisdiction, this injunction was, by express order of the Circuit Court, kept in force pending a determination by this Court of this appeal.

The Act of 1905 expressly delegates jurisdiction and control of the streets, alleys and grounds of cities of the second class to the Mayor and Councilmen of such cities.

We think it requires but a brief argument to sustain this contention. Indeed it is stated in almost the exact language of Section 1 of the Statute. Nothing well could be broader than the language employed by the Legislature in thus delegating its authority. This being true, we are unable to distinguish between an ordinance passed by the city of Clay Center, assuming control and jurisdiction over its streets and grounds to the extent of requiring the Light & Power Company to remove its poles and wires therefrom, and an act of the Legislature providing for the same thing. If we are right in this view, it is the end of the case, for the second amended bill, in unmistakable terms, charges that the contract evidenced by the Dexter ordinance was within the power of the city of Clay Center to make; that the appellant is not and was not a party to any litigation involving the validity of such contract; and that such contract, insofar as it authorized the use of the streets for the purpose of furnishing electric light and power to the inhabitants of the city, was not and could not be, under the plain terms of the law in force at that time, limited in duration to a period of twenty-one years. From these allegations it is clear, therefore, that the Light & Power Company acquired by its conveyance from Dexter through Williamson, a vested right to use the streets of the city to furnish electric light and power to the inhab-

itants thereof, until such time as the city should comply with the obligations on its part to purchase the property used for such purposes; and that the attempt on the part of the city, acting under the express jurisdiction conferred upon it by Section 1 of the Act of 1905, impaired the obligation of this contract and, if the threatened acts should be carried into effect, not only impaired but utterly destroyed the property upon which the appellant must depend, without due process of law. We think this view is sustained by authority.

A Discussion of the Cases.

Walla Walla City v. *Walla Walla Water Company*, 172 U. S. 1, was a suit in equity brought in the Circuit Court for the District of Washington to enjoin the city of Walla Walla and its officers from erecting water works in that city in pursuance of an ordinance authorizing the city officers so to do. From the allegations of the bill it appears that the city was authorized to enter into a contract with the Water Company by an Act of 1883. This act in terms gave the city power to adopt proper ordinances for the government of the city, and in that connection enacted (Section 43): "The City Council shall possess all the legislative power granted by this act."

Pursuant to this statute, in March, 1887, the city adopted an ordinance granting the Water Com-

pany the right to use its streets for the purpose of furnishing inhabitants with water. In 1893 (and be it noted, without any subsequent act of the Legislature in that behalf) the city adopted an ordinance "To provide for the construction of a system of water works" and authorizing the purchase and condemnation of land for that purpose, and an issue of bonds to provide the necessary funds. To the Water Company's bill, setting out the foregoing facts, and referring to the above mentioned statute and ordinances, the city demurred; and the question before this Court was, Whether or not the jurisdiction of the Circuit Court could be sustained on the ground that the case was one arising under the Constitution and laws of the United States? In the course of the argument made by counsel for the city, it was contended that there was a substantial difference between acts of a municipality and those of the state itself. Answering this contention, Mr. Justice Brown, speaking for this Court, said (page 9):

> "It is sufficient for the purposes of this case to say that this Court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants * * * upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it."

He cites many cases in support of this well settled rule.

We desire to direct the attention of the Court to the allegations of the second amended bill of complaint in the case at bar, that the grantee of the Dexter ordinance fully complied with all of the conditions to be performed under the terms of the ordinance by the grantee. This is an allegation of fact admitted by the demurrer; and consequently the demurrer admits a contract protected by the Constitution of the United States against any state legislation which may impair it. Therefore, a case is squarely presented by these allegations of a contract between a municipal corporation authorized to make it, and a citizen, which the same municipal corporation is, so it is alleged in the bill, now seeking to impair by adopting and enforcing a municipal ordinance looking to the destruction of the tangible property employed by the grantee of such grant in carrying out its terms.

Referring to the contentions made by counsel that the cases establishing the rule protecting such contracts from impairment by state legislation are those in which *acts of a State Legislature was involved*, Mr. Justice Brown, in the Walla Walla Water Works Company case, said:

> "It is true that in these cases the franchise was granted directly by state legislation, but it is equally clear that such franchise may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State Legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for

local purposes. As was said by the Supreme Court of Ohio in *State* v. *Cincinnati Gas Company*, 18 Ohio State 262, 293, 'And assuming that such a power (granting franchises to establish gas works) may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority.'"

After referring to the cases which seem to be authority to the contrary, the learned Justice says (page 10):

> "We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

As the authority of the case just cited is recognized in the case of the City of Dawson, 197 U. S. 178, 181, it only should be necessary to show that the case at bar is ruled by the decision in *Walla Walla* v. *Walla Walla Water Company* to dispose of the contention here made.

But, it is said by counsel for the appellees, that in the original and amended bills, the complainant alleges that the city and its officers had no lawful right to adopt an ordinance repudiating the obligation of the Dexter grant; and, therefore, any action taken by the city and its officers looking to the destruction of the mortgaged property would constitute a mere trespass, an unlawful act, not justified by any statute of the state. In other words, that no statute was referred to, giving the city and its officers the right to destroy the mortgaged property,

and therefore, they had no lawful right so to do. We most respectfully insist that counsel's argument should not be permitted to attack pleadings upon which the final decree is not based. Moreover, since the Constitution of the United States is the supreme law of the land, it is necessarily unlawful for any public officer to impair the obligations of contracts or to deprive persons of their property without due process of law. Of course, we do not mean to contend that these constitutional provisions reach cases where a private citizen attempts to impair the obligation of a contract, or to deprive another citizen of his property without due process of law; but upon the authority of the rule laid down by Mr. Justice McKenna in the case of *Pacific Gas Improvement Company* v. *Ellert, Mayor, et al,* 64 Federal 421, we do say that the Fourteenth Amendment to the Federal Constitution prohibiting a state from depriving any person of property without due process of law, applies to an act of any person done or threatened by virtue of public position under a state government. In the case just referred to, Circuit Judge McKenna considered a demurrer to a bill brought in the Circuit Court for the District of California, by the Gas Company to restrain the Mayor and Supervisors of the City and County of San Francisco from condemning certain property used by the Gas Company for the unloading of materials necessary in the transaction of the business for which it was formed. In the course of his opinion, the learned Justice said (page 430):

> "The defendants, however, urge that the Fourteenth Amendment is only directed against state action of the Legislature, or, if it is pro-

> hibitive of executive acts, only of authorized acts, and that in the case at bar there is no act of the Legislature under which plaintiff's property is sought to be taken. * * * both contentions appeared to be opposed to *ex parte Virginia*, 100 U. S. 346."

The learned Judge then proceeds to a consideration of several cases decided by this Court, and quotes largely from the case of *Virginia* v. *Reeves* (page 431) where the rule which he invokes is well stated by Mr. Justice Field as follows:

> "If an executive, or judicial officer, exercises power with which he is not invested by law, and does unauthorized acts, the state is not responsible for them. The acts of the judicial officer, in such a case, where the rights of a citizen under the law of the United States are disregarded, may be reviewed and corrected, or reversed, by this Court."

From this decision, which we earnestly commend to the consideration of this Court, we conclude that no weight should be given to this argument advanced by our learned adversaries.

In *Pacific Electric Railway Company* v. *Los Angeles*, 194 U. S. 112, Mr. Justice McKenna, delivering the opinion of this Court, said:

> "The jurisdiction of the Circuit Court is established when it is shown that complainant had, or claimed to have, a contract with a state or municipality which the latter had attempted to impair, and so long as the claim is apparently made in good faith and is not frivolous, the case can be heard and decided on the merits."

Citing the case of *City Railway Company* v. *Citizens' Railroad Company*, 166 U. S. 557, he quotes as follows:

> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

It may be of interest to note that the foregoing case was decided on demurrer to the bill.

In this connection it may not be inappropriate to say that no want of good faith possibly can be attributed to the complainant. According to the facts admitted by the demurrer, the complainant must rely, for the collection of its mortgage debt, upon the right of the Light & Power Company to maintain its poles and wires upon the streets of the defendant city; that the city and its officers have adopted an ordinance declaring that such poles and wires shall not be permitted to remain upon such streets; and unless restrained by the Court, will proceed to destroy them and thereby completely wreck and destroy the value of the mortgaged property. Surely nothing could be stronger than the claim of a lien holder put in such a position by the threatened acts of persons to whom, by express statute, is delegated the authority of the state over the streets and alleys of a city. With much respect we submit that it is idle to say that in such a case a municipal corporation and its officers are to be treated merely as trespassers. Precisely the same reasoning would set aside the many decisions of this Court, upholding the jurisdiction of Circuit Courts in suits in equity to

restrain the action of boards of railroad commissioners. In the cases referred to it has been the uniform holding of this Court that where a state confers upon a subordinate body, whether it be a board of commissioners or a municipality, jurisdiction and control over property and property rights, if such boards or municipalities undertake to use the authority thus granted so as to impair the obligations of contracts or deprive citizens of their property without due process of law, the Circuit Courts have jurisdiction of such cases because they arise under the Constitution of the United States.

In the case at bar we have a municipal corporation, which, it is contended by the complainant, was authorized by express statutory authority to enter into a contract to furnish light and power to the inhabitants of the city; that such authority was not limited to a grant for a period of twenty-one years; that the limitation expressed in Section 1000, referred to by counsel for the appellees, applies only to contracts for lighting the city itself, and not to grants of authority to use the streets to furnish electric light and power to the inhabitants; and, that the grantee under such contract, having duly performed all of the conditions imposed upon it by the grant, is now about to suffer irreparable damage by a subsequent act of the same municipal corporation pretending to act under the authority of a subsequent statute. We believe that these allegations are sufficient to confer jurisdiction.

In *Siler* v. *Louisville Railroad Company*, 213 U. S. 175, it was charged in the bill that an order of the railroad commission of Kentucky was unau-

thorized by the state statute, but that if it was authorized by such statute, such order was contrary to the provisions of the Federal Constitution. In that case it was argued to this Court that in order to violate the Fourteenth Amendment, it was necessary for the bill to disclose that the order complained of was made under authority of a state statute, and that the allegations that the state statute did not confer the power to make such order, ousted the Court of jurisdiction. Answering this contention, Mr. Justice Peckham, delivering the opinion of the Court, said (page 192):

> "If the averment as to the invalidity of the order of the commission were the only ground upon which a Federal question was founded and if the bill alleged that the order was invalid because it was not authorized by the state, either by statute or in any other way, the objection might be good, but the bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself, on the ground that it violates various named provisions of the Federal Constitution in addition to and other than the Fourteenth Amendment, while some of the other Federal questions are founded upon the terms of the order made by the commission, under what is claimed by the commission to be the authority of the statutes. The bill also sets up several local questions arising from the terms of the order, and which the company claims are unauthorized by the statute. * * * Under these circumstances there can be no doubt that the Circuit Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the Fourteenth Amendment."

Vicksburg Water Works Company v. *Vicksburg*, 185 U. S. 65, was a suit in equity in the Circuit Court for the District of Mississippi, by the Water Works Company against the city, in which it was alleged that the Water Works Company was the grantee of a franchise from the city, and had complied with all the terms upon which the grant depended, and that such grant was a contract protected by the Constitution of the United States; that subsequently the Mississippi Legislature passed an act authorizing the city to issue bonds to construct another water works; that in pursuance of the act an ordinance was adopted by the city, having for its purpose the issuing of bonds and the erection of the water works. The bill further alleged that the subsequent ordinance passed by the city under the authority of the state statute, impaired the obligation of the contract contained in the original grant, and asked for an injunction. In that case, as in this, it was contended that the action of the city in refusing to pay the dues of the Water Works Company, and in issuing bonds to build another plant, constituted a mere breach of contract, but this Court answered, that the facts stated (page 82)

> "did not present the mere case of a breach of a private contract to be remedied by an action at law, but disclosed an intention and attempt, *by subsequent legislation of the city*, to deprive the complainant of its rights under an existing contract."

In view of these cases, and the decisions referred to and approved by them, we think the allegations of the bill sufficient to show a case arising under the Constitution of the United States.

The decision of the Supreme Court of Kansas, holding that the contract evidenced by the original Dexter ordinance in 1886, was void and unenforcible, was an attempt by the State of Kansas to deprive complainant of its property without due process of law, for which the complainant is entitled to relief in the Circuit Court.

On this proposition it is said that the decision by the Supreme Court of Kansas nowhere refers to or authorizes a destruction of the mortgaged property by the mayor and council of the city of Clay Center. From this premise it is argued that the allegations of the second amended bill referring to the decision of the Kansas Supreme Court should not be considered in determining the jurisdictional question. This decision is quoted at length in appellees' brief. It holds and decides that Section 1000, General Statutes of Kansas 1901 (an act in existence at the time the Dexter ordinance was adopted) conferred no authority upon a city of the second class to grant the right to any person or corporation to use the streets for the purpose of erecting poles and wires with which to furnish electric light and power to the inhabitants of such city for a longer period than twenty-one years; and, since the power of the city to make such a grant was limited to one which would not extend beyond the period of twenty-one years, therefore, the city had no right or power to make the contract embodied in the Dexter ordinance. Counsel for the appellees say that this decision of the highest court of the State of Kansas is a construction of a local statute, and therefore, bind-

ing upon this Court; that it is a mere judicial interpretation of a local contract, and therefore, cannot raise any question cognizable by a Circuit Court in the absence of diverse citizenship, notwithstanding the allegations in the second amended bill that by such decision the State of Kansas has attempted to deprive complainant of its property without due process of law.

We suppose that since the decision of this Court in the case of *Chicago Railroad Company* v. *Chicago*, 166 U. S. 266, it is no longer open to doubt "as to the potency of the Fourteenth Amendment to restrain action by a state through either its legislative, executive or judicial departments, which deprives a party of his property without due compensation." What, then, is the effect of this decision of the Kansas Supreme Court? Has it any other or different effect than would result from an act of the Legislature couched in the same language? Suppose the Legislature of Kansas enacted (as it undoubtedly did prior to the Dexter ordinance) that cities of the second class were authorized to grant to persons and corporations the use of their streets for the erection of poles and wires to be used in the furnishing of electric light and power to the inhabitants for a period of forty years; then let us suppose that such a city so authorized enacted an ordinance containing such a grant for that period, would a decision by the Kansas Supreme Court that the word "forty" should be construed so as to mean "twenty" be effective as a construction of a local statute in such wise as to destroy the vested right of the grantee under such contract? We submit that such would not be its effect. It matters not what guise the action of the

state may take, if the plain result is that through its legislative, executive, or judicial departments a citizen is deprived of his property by declaring a contract to be void upon the faith of which such citizen has acted, such action on the part of the state and its officers gives rise to a controversy cognizable in a Circuit Court of the United States.

In the case at bar it is idle to disguise or attempt to minimize the effect of this decision, holding the contract between Dexter and the defendant city to be void. In our opinion no more efficacy should be given this decision than would have been given to it if rendered ten days after such ordinance had been adopted. With the most profound respect for the highest court of our state we say that its judgment that this contract upon which the appellant must rely, was void, is as obnoxious to the Fourteenth Amendment as would be an act of the Legislature to the same effect.

Of course, we take it for granted that this Court will not charge us with the absurdity of contending that if the appellant had been a party to the litigation which resulted in that decision, we could now be heard to complain of it. What we contend is that the act of the Supreme Court of Kansas in holding a valid contract to be void gives rise to the right of this appellant to invoke the judgment of the Circuit Court of the United States, whether or not that opinion had the effect of depriving the appellant of its property without due process of law.

We trust we will be pardoned for having, in a measure, entered upon a discussion of the merits of the controversy presented by the record. It is our

understanding that the brief with which we have been served amounts to an argument of the entire case. We cannot bring ourselves to believe that this Court will not only advance the case, but decide it upon such short notice as we have had. The litigation presented by the record is one of the gravest consequence to our client, the appellant, and we submit that if the motion to advance be sustained, that some further opportunity should be given to counsel for the appellants, to give this Court their more deliberate and better considered views than we have had an opportunity of doing. We take leave, therefore, to ask that this case be advanced under the rule to some day in the present term of this Court, and that it be then heard upon such further briefs and arguments as to the Court may seem proper.

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October, 1910.